IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE FRANTZ CORPORATION,
a Corporation,

Plaintiff in Error,

vs.

E. J. FIFER,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

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STATEMENT OF THE CASE.

The statement of facts and pleadings as contained in the brief of plaintiff in error may be taken as substantially correct, in as much as the transcript sets forth all of the facts set up in the complaint, except that defendant in error sought to recover $2,500.00 per annum for loss of hay, grain, corn, grasses, vegetables and pasturage; $1,200.00 for damage to fences;

$4,000.00 for damage to his lands by reason of the construction of pipe lines, telephone lines, tanks and power stations and other structures thereon and the building and establishing roads over and upon said lands and $2,500.00 damages resulting from loss to his successful farming and stock raising business (Tr. 6).

We cannot subscribe to the statement of evidence as set forth in the brief of plaintiff in error, but prefer to discuss the evidence in connection with the various assignments of error.

We will follow, as near as possible, the order in which the various assignments of error are treated by plaintiff in error.

ARGUMENT.

The main question here presented is the interpretation of an oil and gas lease (Tr. 8-12), upon which the complaint for damages is based. The other points relied upon by plaintiff in error are merely incidental to the main question.

Many pages of the brief of plaintiff in error are used in an effort to show that the lease in question is ambiguous and uncertain and therefore in arriving at the intent of the contracting parties resort must be had to the technical rules of construction. We insist that a careful reading of the lease will disclose no ambiguity or uncertainty, save perhaps the clause "or other damages," contained in the written portion thereof. The effect of the interpretation of the trial court

was to read this clause out of the lease, which was to the decided advantage of plaintiff in error, and consequently it is in no position to complain.

We are not considering an ordinary oil and gas lease. From an examination of the printed portion of this lease it will be seen that it is strongly favorable to the lessee. There is no provision giving lessor the right to free use of oil and gas; no provision restricting operations within certain districts from buildings upon the premises; no provisions for forfeiture in case of failure of the lessee to comply with the terms and provisions thereof and other provisions usually found in oil and gas leases. An examination of oil and gas leases to be found in the reported cases will disclose no lease more favorable to lessee and less favorable to lessor and for this reason we believe the rule that an oil and gas lease is constructed most strictly against the lessee and favorable to the lessor, should apply in this case.

The lease in question is prepared upon a printed form; at the bottom of the printed portion there is contained a written provision as follows:

> "Lessee further agrees to pay to the lessor any damages caused to growing crops, fences, or other damages upon said premises, by lessee or the lessee's agent."

Many courts have been called upon to construe oil and gas leases and we believe the rule of interpretation as adopted by the courts is that such leases

are construed most strictly against the lessee and favorably to lessor.

Morrison on Oil and Gas, page 62.

Bettman vs. Harness, 42 W. Va. 433. 36 L. R. A. 566.

Steelsmith vs. Gartlan, 45 W. Va 27, 29 N. E. 978.

Huggins vs. Daley, 99 Fed. 606.

Corklin vs. Korandusky, 127 N. Y. appel. 761-112 N. Y. (Sup.) 13.

Aycock vs. Reliance Oil Co., 210 S. W. (Tex.) 848.

Curtis vs. Harris, 184 Pacific (Okl.), 574.

The reason for the rule as announced by the Supreme Court of Ohio is as follows:

> "And in view of the fact that such companies usually prepare their own forms of leases, with the assistance of skilled attorneys, which the lessor, without experience in such matters, acts without such legal advice, such leases are to be construed favorably to the lessor, with all doubts resolved in his favor."

Ohio Oil Co. vs. Burch, et al, 124 N. E. 781.

> "In discussing the right of lessor to rents or royalties, it must be borne in mind that oil and gas leases are usually construed favorably, in this respect, to the lessor, if there be doubt concerning the right to rent or royalty, and its amount. The general rule is undoubtedly that a deed is construed most strongly against the grantor and in favor of the grantee. But such

is not the case in an instance of an oil or gas lease; the reason for this arises out of the well known transaction of oil and gas operators. These contracts are looked upon somewhat in the same light as contracts of insurance. By long experience insurance companies have been able to draw a policy which is often difficult to determine just what their liability may be. They have their attorneys who have spent years in studying contracts of insurance and the decisions of the courts, until they have become thoroughly versed in all phases of such contracts. On the other hand, the insured is usually without advice when entering into a contract of insurance and he is almost universally ignorant of the rules of law applicable to such obligations. To such an extent is this true that the courts have adopted a construction, in cases of doubt or obscurity, favorable to the insured. What is true of insurance contracts, may be said to be true of oil or gas leases (if not mining leases). The lessor usually knows nothing of the law applicable to such instruments; while the operator is usually well informed. Years of experience have shown the operator how to draw a lease giving him many advantages, of which the lessor has not even thought. For this reason the courts have adopted a rule to the effect to construe an oil or gas lease most favorably to the lessor, where its terms can be so construed without doing violence to the language used. If the lessor and lessee have put a construction upon the lease, as evidenced by their acts, the courts will adopt that construction.

"Contemporaneous acts of the parties may

> be examined to discover the construction they have placed on the lease. And the construction put on the lease by the lessor and his successor in title cannot be changed by a subsequent purchaser, if the statute of limitations has fully run. The language of the lease or oil contract will also be given its ordinary and common understood meaning when no reason appears for doing otherwise; and it will not be held void for ambiguity when the contract of the parties can be ascertained from the language used in it."
>
> Thornton on Oil and Gas (3rd Ed.), p. 386, § 3251.

This rule applies to the construction of leases of this character in every particular and not merely as to production, as contended by plaintiff in error.

If the contention of plaintiff in error is correct then the written portion of this lease must be entirely disregarded. This cannot be done. To construe it properly, it must be taken in its entirety and effect given to every portion of it, if by so doing a reasonable result can be reached; and only by construing the general printed provisions as they were intended to be construed—that is in connection with the special written provision therein contained, can the whole lease be construed, meaning given to every part of it, and use made of all its language in determining the intent of the parties.

> "The whole of a contract is to be taken together, so as to give effect to every part, if rea-

sonably practicable, each clause helping to interpret the other."

Section 7532, Revised Codes of Montana, 1921.

Wing et al vs. Brasher, 59 Mont., 10-20;

State Bank of Darby vs. Pew, 59 Mont., 144-155;

Esselstyn vs. Meyer & Chapman State Bank, 63 Mont., 461-473;

Emerson Braulingham Implement Co. Rangstad, 65 Mont., 297-304.

"The intention of the parties, which courts seek to discover in giving construction to a contract, is to be gathered, not from particular words and phrases, but from the whole context of the argument. In fact, it may be said to be a settled rule in the construction of courts that the interpretation must be upon the entire instrument, and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Every word in the argument must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. The contract must be viewed from beginning to end and all its terms must pass in review; for one clause may modify, limit, or illuminate, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other

course. Seeming contradictions must be harmonized if that course is reasonably possible. Each of its provisions must be considered in connection with the others, and, if possible, effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions. The courts will look to the entire instrument, and, if possible, give such construction that each clause shall have some effect, and perform some office. * * *"

6 R. C. L., p. 837, Section 227.

"Since the object of construction is to ascertain the intention of the parties, the contract must be considered as an entirety. The problem is not what the separate parts of the contract mean, but what the contract means when considered as a whole. * * * "

Page on Contracts, Section 1112.

"The contract must be considered as a whole, and regard must be had to the situation of the parties, the surrounding circumstances, and the object to be accomplished, in order to arrive at the intention of the parties."

Far West Oil Co. vs. Wittmer Bros., 143 Cal. 306-310, 77 Pac. 61-62.

To the same effect are:

Stockton Saving & Loan Society vs. Purvis, 112 Cal. 236, 44 Pac. 561;

Wilson vs. Asphalt Co., 142 Cal. 182, 77 Pac. 787;

Barnett vs. Barnett, 104 Cal. 298. 37 Pac. 1049.

"A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole. Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect."

13 C. J., p. 525, Sec. 486.

No rule of law is better settled than that where a part of the contract is written and part is printed, that the written and printed portions must be construed together, but where there is an inconsistency between the written and printed portions or where there is doubt as to the meaning of the whole, the written portion will control the construction to be placed upon such contract.

"It is a well settled rule of law that where part of a contract is written and part is printed, and the written and printed parts are apparently inconsistent, if there is reasonable doubt as to the sense and meaning of the whole, the words in writing will control the construction of the contract. The reason why greater effect is given to the written than to the printed part of a contract if they are inconsistent is that the written words are the immediate language and terms selected by the parties themselves for the expression of their

meaning, while the printed form is intended for general use without reference to particular objects and aims. * * * The general rule is resorted to, only from necessity when printed and written clauses cannot be reconciled, and in that respect is like the rule applied in the construction of wills where two clauses are repugnant and irreconcilable, in which case the first will be rejected, and the subsequent clause will be regarded as indicating the final intention, in the absence of any other clue to the interpretation. But it is the imperative duty of courts to give effect, if possible, to all the terms of an argument. The construction is to be made on a consideration of the whole instrument, and not on one or more clauses detached from the other; * * * when the written and printed parts may be reconciled by any reasonable construction, as by regarding one as a qualification of the other, that construction must be given, because it cannot assume that the parties intended to insert inconsistent provisions * * * "

6 R. C. L., p. 847, Sec. 237.

"If the contract is written in part and printed in part, as when it has been filled in upon a printed form, the parties usually pay much more attention to the written parts than to the printed parts. Accordingly if the written provisions cannot be reconciled with the printed, the written provisions control. The written parts are the immediate language and terms selected by the parties themselves for the expression of their meaning and accordingly must control in case of conflict. * * * "

Page on Contracts, p. 536, Sec. 498.

In Montana the rule is by statutory enactment even broader than that announced by the authorities just quoted. Section 7542 of the Revised Codes of Montana 1921, provides:

> "Where a contract is partly written and partly printed or where part of it is written or printed under the special direction of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from the form. And if the two are absolutely repugnant, the latter must be so far disregarded."

Counsel cites Section 7545 of the Revised Codes of Montana 1921, as supporting the contention that the written portions of this lease should be most strongly construed against lessor, basing their contention upon the assumption that lessor caused the uncertainty to exist, and set forth a portion of said section; however, counsel neglected to quote the portions which are at variance with their contention and favorable to the interpretation sought to have placed upon said lease by defendant in error.

Said Section 7545 in so far as it is applicable here provides as follows:

> "In cases of uncertainty, not removed by the preceding rules, the language of the contract should be interpreted most strongly against the

party who caused the uncertainty to exist. *The promisor is presumed to be such party;* * * * " (Italics ours).

There is nothing in this record to show that lessor caused the uncertainty to exist and nothing from which such inference can be drawn so that if as counsel contends the words used in the written portion are ambiguous or uncertain then the court must presume that the lessee caused such ambiguity and uncertainty to exist. No evidence can be pointed out and no circumstances sufficient to rebut this statutory presumption.

Construing the lease then in the light of the authorities above cited there can be no difficulty in determining what was intended—no difficulty in ascertaining the true intent of the parties thereto and thus give force to each part and paragraph thereof without doing violence to the language used or the object sought to be accomplished.

Considering this contract as a whole, giving effect to each word, part and paragraph, considering the facts and circumstances under which it was executed, the matter to which it relates, its purposes and objects, there can be but one reasonable interpretation placed upon it, viz.: That lessor granted, devised, leased and let unto lessee, for the sole and only purpose of mining and operating for oil and gas, the laying of pipe line, etc., the lands in question, and lessee agreed to pay lessor any damages caused to growing crops, fences and any other dam-

ages upon said lands by lessee or his agents resulting from his operations thereon.

We believe the interpretation placed upon this lease by the trial court, so far as damages to fence and crops were concerned, was correct, and while we believe the court erred in not permitting recovery of damages to the land caused by the construction of roads, the building of pipe lines, etc., as coming within "or other damages," yet this question is not before this court.

Nothing could be plainer or simpler. We have the clear intent of the parties expressed in language not susceptible of a different meaning and not likely to be misunderstood or misconstrued. And in doing so we do not have to disregard or read out language placed there by the parties for a purpose.

But plaintiff in error will no doubt insist that such an interpretation makes the contract unreasonable and burdensome. We insist that there is nothing unreasonable in such an interpretation. But assuming for the sake of the argument that it is, that fact is no concern of the court. Whether lessee struck a good or bad bargain with lessor will not be considered. It is the duty of the court to enforce contracts, not to make new ones for the parties.

In the case of Hinerman vs. Baldwin et al, 215 Pac. 1103-1109 (Mont.), the Supreme Court of Montana in disposing of a similar contention said:

"Whether the plaintiff made a good or a bad

bargain is of no concern to the court. He was of legal age, and had all of the facts squarely and clearly before him long prior to the execution of the lease. Merely because the terms of the contract now appear unreasonable or burdensome affords no reason to permit him to avoid his contract. Frank v. Butte & Boulder Co., 48 Mont. 83, 135 Pac. 904; Pearce v. Metropolitan Ins. Co., 57 Mont. 79, 186 Pac. 687; State Bank of Darby v. Pew, 59 Mont. 144, 195 Pac. 852; Friesan v. Hart-Marr Co., 64 Mont. 373, 209 Pac. 986; Emerson-Brantingham Imp. Co. v. Raugstad (Mont.), 211 Pac. 305; General Fire Extinguisher Co. v. Northwestern Auto Supply Co. (Mont.), 211 Pac. 308; McConnell v. Blackley (Mont.), 214 Pac. 64.

"When parties have reduced their contracts to writing, the writing is presumed to contain the final agreement arrived at between them and to express their real purpose and intent. The duty of the court is to enforce contracts, not to make new ones for the parties, however unwise the terms may appear. To permit the avoidance of written contracts upon such pretext would be to open the way to defeat the very purpose of contracts in writing."

Similar expressions may be found in numerous reported decisions, in fact this question is so well settled that we deem further authority wholly unnecessary.

Counsel for plaintiff in error discusses at some length the rights of a lessee under an oil and gas lease without reservation or restriction and attempts to show

that the construction of such a lease is applicable in the instant case.

We concede that under an oil and gas lease, which contains no reservations or restrictions, a lessee has the right to go upon the premises, construct roads, build pipe lines, power lines, power stations, in fact the right to do any and all things reasonably necessary to carry out the objects and purposes of the lease or incidental thereto and is not liable for damages or resulting injury to crops or premises. But we do not have such a lease for consideration. There is one saving clause, the reservation restriction and qualification that lessee shall pay any damages to fences, crops, etc., caused by lessee upon the premises. Unquestionably, save for the written provision contained in the instant lease, defendant in error could not recover for acts of lessee reasonably necessary in the development and operation of the leased premises.

Plaintiff in error presents here and for the first time the question of the right of lessor to use the surface of the leased premises to carry on his farming operations. It is argued that because no reservation of that right is expressly contained in the lease that lessor was in effect a trespasser without right to use his land for any purpose, and having done so he assumed the risk of having his fences torn down, his ditches destroyed and his crops eaten by stock owned by plaintiff in error and range stock. The contention is absurd.

There is nothing in the lease to indicate any such intention in the minds of the parties. The land was leased for the sole and only purpose of mining and operating for oil and gas, the laying of pipe lines, etc., and for no other purpose.

As a matter of fact the written portion of said lease contains the express reservation and qualification that plaintiff in error insists does not exist. The very fact that the lessee agreed to pay for any damages to crops and fences indicates beyond per-adventure of doubt that the parties understood that the lessor would continue to farm his property as he had been doing prior to the execution of said lease.

And again, during the year 1920 lessor did occupy and farm the land without objection on the part of lessee. In 1921 he occupied the premises during a portion of the season and attempted to cultivate a portion of it and again without objection on the part of the plaintiff in error. There is evidence in the record that since that time a party (although his status is not clearly defined) has been occupying the premises and cultivating a small portion of it without objection on the part of the lessee. In fact the evidence discloses that lessee furnished pipe which was used by said party for the purpose of conveying water for use upon said premises. It is shown conclusively that the parties to the lease understood that lessor had that right. This is the interpretation they have placed upon the lease and the court will give great weight to the practical interpretation thereof by the

parties. Surely there is no better method to determine what the parties to a contract meant than to ascertain what they have done under it.

Where parties to a contract of doubtful or ambiguous meaning have placed upon it a practical construction and have by their acts under it shown what they considered the contract to mean and especially where this particular construction is shown to have been followed for a long period of time, the courts invariably follow such practical construction and hold it to be controlling.

> "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done.
>
> "Surely, there can be no doubt that in determining the meaning of an indefinite or ambiguous contract the construction placed upon the contract by the parties themselves is to be considered by the court. It has been said that in order to render applicable the rule that contemporary construction of a contract by acts of the parties is entitled to great weight, it should appear with reasonable certainty that they were acts of both parties, done with knowledge and in view of a purpose at least consistent with that to which they are sought to be applied. In such a case the practical interpretation by the parties themselves is entitled to great, if not controlling influence in ascertaining their understanding of its terms. In fact where from the terms of the

contract, or the language employed, a question or doubtful construction arises, and it appears that the parties themselves have practically interpreted their contract, the courts will generally follow that practical construction. It is to be assumed that parties to a contract know best what was meant by its terms, and are the least liable to be mistaken as to its intention; * * * ."

6 R. C. L. p. 852, Section 241 Page on Contracts, Section 1126;

District of Columbia vs. Gallagher, 124 U. S. 505;

Thomas vs. Cincinnati Railway Company, 81 Fed. 911;

City of Chicago vs, Sheldon, 9 Wall 50;

Hill vs. City of Duluth, 57 Minn. 231, 58 N. W. 992;

St. Louis Gas & Light Company vs. City of St. Louis, 46 Mo. 121;

School District of South Omaha vs. Davis, 76 Neb. 612, 107 N. W. 842;

Board of Commissioners vs. Gibson, 158 Ind. 471, 63 N. E. 982.

"The practical interpretation of any agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done."

Insurance Co. vs. Dutcher, 95 U. S. 269-273.

Where there is any doubt from the language in

the contract as to what was intended in any regard it is customary for the court to place itself in the position of the parties who made it as nearly as may be done by considering all of the facts and circumstances, the nature of the subject matter, the relation of the parties and the object sought to be accomplished. The rule as announced by the Supreme Court of Montana in the case of

> McDonald et al vs. McNinch et al, 63 Mont. at page 315,

is as follows:

> "It was the duty of the trial court to interpret the lease in the light of surrounding facts and circumstances bearing upon the transaction (Section 7538 R. C. 1921); in other words, to put itself as nearly as might be in the situation of the parties at the time they entered into the agreement, and to view the circumstances as they viewed them, and to judge of the meaning of the terms and the correct application of the language of the contract."

The rule as laid down in Corpus Juris is as follows:

> "Courts in the construction of contracts, look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and accordingly they are entitled to place themselves in the same situation as they viewed them, and so as to judge of the meaning of the

words and of the correct application of the language to the things described. It is therefore an established canon of construction that in order to arrive at the intention of the parties, the contract itself must be read in the light of the circumstances under which it was entered into. General or indefinite terms employed in the contract may be thus explained or restricted as to their application and meaning and the contract must be so construed as to give it such effect, and none other, as the parties intended at the time it was made. This rule appears to be applicable only when the terms employed are susceptible of more than one meaning. In such cases it is the duty of the court not only to regard the nature of the instrument, but also to inform itself of the circumstances which surrounded the parties at the time, so as to interpret the language employed from the standpoint which the parties occupied when they executed the contract. It has been declared, moreover, that the prevailing notions and opinions in the places where the contract was made are presumed to have entered into contemplation of the parties, and that in accordance with law are not to be discountenanced in construing the contract."

6 R. C. L. page 849, Section 239.

Page on Contracts, Sec. 1123.

State vs. Twin Falls Canal Co., 21 Ida. 410, 121 Pac. 1039.

The lease in question is dated September 26th, 1919, and the first work looking to development in the field was started November 21, 1919 (Tr. 97).

Defendant had filed on the land during the winter of 1913 and 1914, cleared the same, built ditches, enclosed it with a four galvanized wire fence, cedar posts set twenty feet apart around the entire tract, with cross fences, built hay corrals, stock corrals, barns, sheds, cow sheds, ice house, tool house, chicken house, two log houses 16x20 (Tr. 34 and 35). About twenty-five acres in the east forty and thirty acres in the south forty were under cultivation and growing hay. Defendant was engaged in farming and stock raising which had been carried on since he had resided upon the land (Tr. 36). In view of these facts and the practical construction placed upon the lease by the parties themselves it is ridiculous to say that lessor had no right to occupy and cultivate the land under the terms of the lease.

If the written provision does not mean exactly what it says, and as construed by the trial court, then the words are meaningless and must be brushed aside and the court must say that when this provision was inserted in said contract the parties intended an idle act and one that would accomplish no purpose in connection therewith.

Counsel will undoubtedly contend that this clause was intended to cover any damages caused by lessee not reasonably necessary in the development and operation of said property or incident thereto. Lessor had that right and no expressed stipulation or agreement was necessary.

It has been held that a lease not containing an ex-

press agreement providing that lessee should be liable for damages caused to crops or other surface rights, that lessee was liable for their destruction unless he showed that the damages to them were necessarily incidental to the operations authorized in the lease.

> "A lease of a tract of land for oil or gas purposes does not necessarily exclude the lessor from using or cultivating its surface if it does not interfere with the operations of lessee."
>
> Thornton on Oil and Gas, Section 82.

In the case of Pulaski Oil Company vs. Conner, 162 Pac. 464 (Okla.), plaintiff in error contended that because the lease did not contain an expressed stipulation providing for the payment of damages for injury to crops, fruit, etc., lessor could not recover for such injury. The Supreme Court of Oklahoma in passing upon the question used the following language:

> "While an oil and gas lease carries within its implications, if not within its expression, such rights as to the surface as may be necessarily incident to the peformance of the objects of the contract, yet it is well settled that the implications go no further, and that the holder of a mining or oil and gas lease must protect the surface of the ground in so far as incident necessity does not exist."

And the rule is announced in Cyc, in the following language:

> "All incidental rights to that of getting minerals under a grant or reservation thereof must be ex-

ercised with due regard to the right of the surface owner without any permanent damage thereto not necessary for the beneficial enjoyment of the mine; * * * "

27 Cyc., 784-b.

Plaintiff in error next complains that the trial court erred in permitting testimony relating to the damage caused in placing the various structures upon the premises and the instructions given to the jury in regard thereto. (Assignment No. II, III, a, b, h and No. V).

In considering these points it will be helpful to refer to the pleadings in the case.

In paragraph eight of plaintiff's complaint it is alleged that defendant acting under the provisions of the lease entered upon the land in carrying on its operations opened and tore down part of the fences of plaintiff enclosing said land, established roads across said lands, built pipe lines thereon, constructed telephone lines, tanks, power and pumping stations for the purpose of caring for and handling the production of oil produced upon lands other than those of plaintiff and built a water pumping station to supply water for its own operations in the Cat Creek field as well as to other persons operating for oil and gas in said field. (Tr. 4).

Paragraph three of defendant's answer admits the entry upon said land, opened some of the fences, established certain roads and the construction thereon of the structures set forth in plaintiff's complaint:

"for the purpose of caring for and handling the

> production of oil produced upon the lands of plaintiff and other lands and built a water pumping station upon said lands to supply water for its operations in the Cat Creek field * * * ." (Tr. 16).

In paragraph ten of plaintiff's complaint it is alleged that in addition to the operations upon plaintiff's land that defendant at all the times mentioned was conducting extensive oil and gas operations on land adjoining and in the vicinity of the lands in question and that the operations upon plaintiff's lands were incidental to and a part of defendant's general operations and that defendant made use of plaintiff's lands in carrying on said general operations (Tr. page 5). In its answer defendant admits the allegations of said paragraph ten. (Tr. page 15).

During the course of the trial the court found it necessary to interpret the lease and it was held that plaintiff was entitled to recover damages to crops and fences, but that damage which would accrue by reason of the sinking of wells, placing of pipe lines, etc., in the development and operation of the leased premises was not an injury within the meaning of the lease. To use the language of the court:

> "Well, I will hold that any damage like to the crops or fences that these parties would do in carrying on their legitimate operations would of course be within that term of the lease I think, but damage which would accrue by reason of their sinking a well or placing a pipeline to convey the oil or water for the benefit

> of both parties, the injury that would do wouldn't be called damages. I can't understand any principle of law that would call that a damage; * * * I think I would place that construction on it, in the absence of any authority from the standpoint of principle and reason; but if they have placed on there instrumentalities that are not for this particular land, to carry out this particular lease, seeking to make it the base of operations for their other surrounding lands, that were not contemplated by the parties, I think you might show it; it will be a matter to be shown to the jury; make the best proof of any damage on that that you can and it will be for the jury to determine to the best of their judgment whether it is in fact a damage in the sense of the word. I think you may show the entire situation as far as you think it necessary."

So, it will be seen that the testimony as to damage caused by placing these structures upon the land was limited to cover only excess damages that might have resulted by reason of the operations of the defendant on lands other than those of the plaintiff.

Counsel expresses the belief that the first interpretation placed upon said lease by the court was correct but insisted that notwithstanding the language used (and in part quoted above), the court erred in permitting testimony of this damage and went beyond its first interpretation.

An examination of the entire record covering this feature of the damages will show that this character of testimony was limited to the one proposition only

of showing excess damage and the court in its instructions to the jury carefully guarded such testimony and restriced its application in no uncertain terms to damages, if any, caused to the land by reason of the structures under consideration, over and above any injury or damage that might have resulted had defendant's operations been confined to the land in question.

The instructions of the trial court upon this feature of the case are so explicit that we take the liberty to quote them in full. The court said:

> "As the court and the law construes the lease, this would compel the defendant to pay for any damage to crops and fences, no matter whether necessarily inflicted in attempting to find and dig oil from this land or not, but it does not compel the defendant to pay for any injury to the land consequent upon reasonable pursuit in this land of the oil that was supposed to be there, and any reasonable buildings and derricks, a pumping-plant, pipe-lines, telephones and the like for the purpose of taking the oil out of this particular land. No one could call that—the results of those operations—damages, and the party did not have that in mind. They were contracting that he should actually come in and do that variety of work, Franz, for the benefit of them both. But while this lease justified the defendant, as the successor of Franz, in erecting upon this land any reasonably necessary structures for finding and taking of oil out of this land, and that would include all such roads as were reasonably necessary, any pipe-lines reasonably necessary, pump-

ing plant and telephone, it wouldn't justify the defendant in making this land the basis of operations upon surrounding lands that the defendant was engaged in taking oil from; and if the defendant did make use of this land as a basis of these operations elsewhere, and if by reason of that fact it inflicted greater injury upon the land than was the natural consequence of its operations upon this land, why, for that excess injury it would be liable to the plaintiff as any other trespasser would have been. It is not a matter of contract so far as those damages would be concerned because the contract did not provide that the defendant might inflict any such variety of injury upon the land." (Tr. pp. 145-46-47).

And again:

"When we come to the land, then this is the situation in respect to that: It does appear that roads were built upon the land by the defendant, and its claims that those roads were necessary for the development of the oil within the plaintiff's lands. The plaintiff says no, these roads were really built before there was any oil development on this land, built to enable the defendant to develop other lands and were unnecessary for the Plaintiff's lands. So with the pipe-lines and the pumping plant. The plaintiff insists that they were more extensive and larger than would have been necessary for a reasonable development of its lands. You may remember, however, that when this lease was entered into and the defendant proceeded to explore the land for oil, or getting ready for it, no doubt both parties did not antici-

pate that the production would be as small as it was up to the present time, and I think the lease still continues there may be future development. If the defendant overbuilt its plant, yet if it built it in good faith for the development of this land, it is not responsible because it now turns out that the plant is larger than the necessities of the land so far appear to justify. Another thing, if it did build a larger plant than is necessary in the way of pipe lines, oil and water, and pumping plant, that alone does not make the defendant liable for more than nominal damages unless they increase the burden upon the land, increase the injury to the land. For instance, let it be assumed that the defendant consciously built a pumping plant intended to serve surrounding territory as well as this land and larger than it would have built for this land alone, if the larger plant does not injure the land any more than a smaller plant would injure the land, then the plaintiff is not entitled to any substantial damages merely because the defendant built it too large for this land. In other words, there must be damage before the act of the defendant can confer upon the plaintiff a right to collect damages. So with pipe-lines and other instrumentalities.

"As before stated by the Court, any damage to the land itself, due to the defendant's operations upon this land by virtue of the lease, was not within the contemplation of the parties that the defendant would pay for them. They expected that some injury, occupation of the land would follow the contract between them at least, but any damages, if you can find any, to the

land that are due to the defendant's operations in the surrounding territory, that would not have been inflicted but for the defendant's operations in the surrounding territory, you are directed to allow those to the plaintiff, as he is entitled to them.

"Now, when you come to determine the damage to land, the rule of damages laid down by the law is this: In order to arrive at what the land has suffered from a monetary standpoint you take the value of the land before the injury was done to it and the value of the land after the injury was done to it, and the difference, if any, will be the money value of the damages that have been inflicted. For instance, if you should find that this land was worth five thousand—simply taking that as an illustration—five thousand dollars before the defendant operated upon it and did the things upon it that it is contended it did, and if you find that the land is now worth let us say two thousand dollars—only for illustration—the damages to the land would be the difference between five and two, or three thousand dollars. But that is not all; then it would be for you to determine how much of that is an excess due to the operations of the defendant on the surrounding territory instead of upon the land of the plaintiff itself. If the damages would be as great from the operations of the defendant upon the land itself as they are in connection with the operations of the defendant on the outlying lands, then the defendant's operations in contemplation of law haven't injured the plaintiff at all and he wouldn't be entitled to anything for that; but it is for you to say whether the outlying

operations added to the damage on the land and, if so, how much." (Tr. pp. 149-50-51).

It is true that witnesses, Lands and Sontag, testified in substance that the various structures placed upon the Fifer tract were necessary for use in the development of said property and caring for the production therefrom. Yet, we believe the whole of the testimony of these two witnesses, when taken in connection with all the facts and circumstances surrounding the operations of defendant company show conclusively that much of the damage to the land was the result of the operations on other lands and not incident to or reasonably necessary in the work prosecuted under the instant lease.

It will be remembered that the first operations were commenced by defendant on the Charles tract on November 21, 1919; that various operations on other lands were carried on between that date and the time actual development work was undertaken on the Fifer tract—in May, 1921. In fact, the testimony shows that practically all of the roads were constructed long before any work on the Fifer tract was undertaken.

The witness, Sontag, testified that no less than six wells were drilled east of the river and four wells west of the river (Tr. page 119). The defendant Fifer testified that all of the materials and supplies used in the drilling of the wells to the west of the river were hauled through his place and that most of the material used in the drilling of the wells east of the river were hauled through his place. Landz testified

that three wells were drilled east of the river and that operations for three wells across the river had been started before any work was undertaken on the Fifer lease. (Tr. 97). The testimony also shows that the pumping station constructed upon the Fifer tract was not necessary and was not used in drilling the two wells upon the Fifer tract by the defendant. The witness, Landz, testified that the water for use in drilling the Franz-Fifer No. 1 was a gravity line from the O'Day well and that the pumping station was not used (Tr. page 100), and that in drilling the Franz-Fifer No. 2, water was obtained, not from the pumping station, but from the Charles No. 1 (Tr. page 101); that plaintiff's fences were destroyed and plaintiff forced to abandon his farming operations long before work was ever started on his property.

There is other testimony similar to that just referred to which bears out the contention of plaintiff that the land in question was used as the basis of operations of defendant in the Cat Creek field and that much of the damage done to the lands was by reason of the use thereof and not in connection with the development of the Fifer tract or in securing the production therefrom.

Certainly, plaintiff in error will not be heard to say that plaintiff below was not entitled to recover for injury done to the leased premises by reason of the extensive operations carried on by plaintiff in error on other lands. In no sense of the word

was the use to which said lands were put reasonably necessary or incident to the development and operation of the Fifer tract.

The position of plaintiff in error is most peculiar. It says in effect—I made use of your land for one and one-half years in carrying on my general operations in the Cat Creek field before I started work on your land; drilled a number of wells on other lands; hauled the material through your land; tore down your fences; built roads; permitted my stock to feed upon your crops, but because you can't point out to a nicety and to a cent what damage resulted from these operations and what damage resulted from my operations upon your land, you cannot recover.

The evidence introduced on behalf of plaintiff and defendant showed the actual conditions as they existed and the ultimate question, the amount of damage, was for the jury to determine under proper instructions from the court. Counsel insists that plaintiff did not segregate the damage. As stated above, the facts were shown and under no rule of evidence could plaintiff go further. There can be no doubt that plaintiff would not have been permitted to show by witnesses, expert or otherwise, what part of the damage was caused by the operations of the defendant upon other lands and what part resulted from the development of the Fifer land, or what buildings, tanks, pipe lines, etc., were necessary. The determination of that question was strict-

ly the province and office of the jury.

The Supreme Court of Ohio in passing upon a question very similar in every respect to the one here presented, said:

> "The trial court overruled the objection of the plaintiff, allowing the defendant to propound to several witnesses this question, 'what buildings or structures were necessary to be placed upon this lease in order that the same might be properly operated for oil and gas?' The Circuit Court held that this was prejudicial and for that reason, reversed the judgment of the court of common pleas, and remanded the case to that court for a new trial. Thus far the proceedings by the Circuit Court were strictly correct. The question called upon the witness to answer, in regard to one of the ultimate facts which it was the province of the jury only to answer; but the jury cannot be aided by the opinions of those who are not triers of the facts as to the very issues which the jury is itself sworn to determine from evidence."

Fowler vs. Delaplain, 87 N. E. 260.

See also:

Ohio and Indiana Co. vs. Fishbourn, 56 N. E. 457.

Railroad Company vs. Schultz, 1 N. E. 324.

In the case of Fort Pitt Gas Company vs. Evansville Contract Company, 123 Fed. (C. C. A.) 63, the Circuit Court of Appeals, Third Circuit, in pass-

ing upon the admissibility of opinion evidence used the following language:

> "We concur in the ruling of the court below that the pipe was a lawful structure, but that the gas company was bound to exercise such care, both in laying and maintaining it across the river, as men of ordinary prudence would exercise to avoid its causing damage to those engaged in navigation. Whether the defendant had fulfilled this obligation was a question for the jury; but the testimony of Hollerback, to the effect that there would have been danger of a steamboat striking the pipe, if coming ashore, was not relevant. Apart from the fact that it referred to a steamboat, and not to a dredge, it was evidence, not of facts, but of opinion, and of opinion touching a point which, without peculiar knowledge or exceptional experience, could readily be understood and properly dealt with."

The rule that the opinion of conclusion of a witness is not admissible in evidence when all the facts and circumstances are shown and described so that the jurors may readily form a correct conclusion therefrom is so well established that we deem further authority wholly unnecessary.

We believe that under the clause "or other damages" as used in the written portion of said lease, plaintiff was entitled to recover any and all damage to the leased premises resulting from the construction of roads, power stations, tanks, pipe lines, etc., whether necessary in the development of said prem-

ises or not. If our interpretation is correct, then the testimony of the character under consideration was admissible and should not have been restricted by the trial court merely to show excess damage as the result of the operations of defendant upon other property and defendant was decidedly favored in the interpretation placed thereon by the trial court and can be heard to complain.

Plaintiff in error next insists that the testimony is insufficient to justify the verdict. A review of the record will disclose that there is ample evidence to support the verdict, in fact we believe the jury under the evidence introduced, would have been justified in giving plaintiff a much larger amount.

A brief resume of the testimony will show that the position of plaintiff in error is not tenable. Taking up first the testimony touching the destruction of the fences. The plaintiff, Fifer, testified that at the time the defendant commenced operations his fences and gates were in first class condition; that in hauling back and forth over his place, the Franz people opened the fence or gates "sometimes they did not go through the gates at all, they would go through a fence, if they did, I don't think it was ever up twenty-four hours after that. They tore down first on the north and then south diagonally across the place. The fence now is practically all open everywhere, some gone, removed. In the early operations in the first place they opened the fence on the northeast and came diagonally across to their camp

to the south, opened it then in two places and then there were the gates. You know they haul those big camp wagons and left fence down, had to go north and south and moved it before they got their big camp built. After they would take down the fences they were never repaired and put back. I have gone over it a good many times and did that. Lots of times the wires were tacked down to the lower post when they drove over it first before other teams came in driving over it, and they would hook into that wire and pull it every old place around over the place. In the spring of 1920 the fence was down different places around the place. In the spring of 1920 before I commenced farming operations my time was spent in repairing fences and hunting cattle and fixing fences and gates. In the spring of 1920 I put in a full and complete new fence about sixty rods of the coulee where all the wires and posts were gone. I put that in the second time." (Tr. pages 38-39).

> "Fences in the spring of 1921 were torn down entirely and the entire tract of land was open to the range stock. Along about March 1, 1921, I went down on that piece of forty and fixed up the fences and drove the stock out. I could not do anything with reference to the other portions of the fences. The roads were all mixed up and cut up and I didn't try to do anything." (Tr. 42).
>
> "The reason for the loss of my crop in 1921 was through the fences being torn down and the roads and the traffic and business through the place and the range stock. In the spring

of 1922 there were no fences kept up around the outside." (Tr. page 43).

The witness, Landz, who testified for the defendant corroborated the testimony of Fifer in practically every detail in so far as the destruction of the fences by the Franz Corporation was concerned.

> "I know that during the time that we were drilling the Charles and O'Day wells that the fence on Mr. Fifer's land on the west end and on the south side was down in a number of places, left down for the purpose of crossing over the land, and the fence on the south side, immediately surrounding our operations on the Charles lease, was practically destroyed; that is, on the north of the Charles and south line of Mr. Fifer's tract, practically half a mile, was destroyed. At one time I had forty teams hauling material back and forth. The most of those teams went in on this other road and came down by Mr. Fifer's house. I do not mean to say all of those teams went through the gate, and when the teamsters did go through the gates they were not always closed; we closed them and watched them and tried to keep them closed, but it was impossible to do it. During the spring when the roads were bad, we got through there the best way we could. If we could keep on the road, we did, but if it was necessary to take down a fence to get through, we did that. * * * I remember that during the summer of 1920 Mr. Fifer had trouble with stock on his pasture. The horses that were used by the Franz Corporation were pastured more on Mr. Charles' land than on Mr. Fifer's. Some of the horses would get

over on the Fifer land. The fence that separated the Charles tract from the Fifer land was practically destroyed, though he had a very good fence around his meadow at that time." (Tr. 99, 100).

On direct examination this witness testified that the gates were kept closed so far as the Franz Corporation was concerned and sought to leave the impression that the fences were kept up until the stampede and that the stampede was responsible for the destruction of the fences. However, a reading of the testimony above quoted, shows conclusively that the fences were destroyed and removed by the Franz Corporation and there is no testimony of any kind or character that the stampede, so-called, was responsible for the loss of any of the fences in question and no testimony that the people who used the land and roads, as testified to by Landz, ever tore down or destroyed one foot of fence on the Fifer tract. Landz testified that during the time that the Charles and O'Day wells were being built that the fences on the west and south side were down in a number of places and it will be remembered that these wells were drilled during 1920 and 1921, and before actual operations were started on the Fifer land.

In the light of the testimony, not only of plaintiff, but that offered by defendant, we are at a loss to understand how counsel can contend that the evidence is insufficient to show the destruction of the fences by the Franz Corporation.

If, then, the defendant was responsible for the destruction of the fences as we contend, it must follow that it is liable for the loss of crops as a result thereof. On this point the plaintiff Fifer testified that about thirty acres in the east forty was under irrigation and growing blue-joint hay and about five acres across the river was growing alfalfa (Tr. 36), and thirty acres in the south forty was seeded to sweet clover (Tr. 36) in the fall of 1919 and that in the spring of 1920 there was a good stand of sweet clover (Tr. 40); that from the field of blue-joint he cut in 1920, 45 tons (Tr. 40), but did not get a second crop; that the second and third crops on the tract across the river were lost and would have produced about eighteen tons; that he did not get a crop from the thirty acres in sweet clover (Tr. 40); the value of the pasturage for the entire tract was $150.00 per year.

As to the year 1921, he testified that the blue-joint would have produced, but for the destruction of his fences, thirty to forty tons (Tr. 42); the thirty acres of sweet clover would have produced one ton to the acre (Tr. 42) and the tract across the river would have produced two tons to the cutting and three cuttings (Tr. 43).

As to the year 1922, he testified that in his opinion the thirty acres of sweet clover would have produced two crops of a ton to a ton and a half per cutting. The blue-joint would have produced forty to forty-five tons and the tract across the river would have

produced about the same as in 1921—two tons per acre per cutting (Tr. 43, 44).

The witness, Al Dixon, a farmer living about a mile north of the land in question testified as a witness for plaintiff that in his opinion the thirty acres in clover on the south forty would have produced one ton to the acre in 1920 (Tr. 64); that the alfalfa across the river would have produced another crop of one ton per acre and that there was a chance for a third crop (Tr. 64); that in 1922, in his opinion, the blue-joint would have produced thirty-five to forty tons; the tract across the river would have produced two and one-half to three and one-half tons per acre (Tr. 65) and the sweet clover in the south forty would have produced a ton or better per acre; that the value of the pasturage upon said place was $1.00 per acre per year.

The witness Routin, a farmer living about two and one-half miles from the Fifer tract testified that he knew the land in question and that the patch of alfalfa across the river would have produced three crops ranging from two and one-half tons down to one ton or less (Tr. 73); that the sweet clover in the south forty would have produced in 1920 a ton to a ton and a half per acre; that in the year 1921, in his opinion, the tract east of the river would have cut three or four tons to the acre in three cuttings (Tr. 74); the thirty acres in the south forty in sweet clover would have cut one to two tons per acre (Tr. 74); the blue-joint would have produced thirty-five to

forty-five tons that year (Tr. 73). In 1922, in his opinion, the blue-joint would have produced a ton and a half per acre; the tract across the river four or five tons and the thirty acres in sweet clover would have produced from one to two tons per acre. This witness also testified that the value of the pasturage for said land was $1.00 per acre per year.

The testimony shows that the market value of alfalfa and sweet clover during the three years in question was $15.00 to $25.00 per ton in the stack (Tr. 44, 66, 74), and the market value of blue-joint during those years was twice as much as alfalfa (Tr. 66, 75). There is also testimony that the market value of blue-joint in the vicinity during the years in question was as high as $40.00 per ton.

The testimony also shows that the cost of producing and stacking, not including irrigating, was $2.00 per ton (Tr. 44, 66), and the cost of irrigating $50.00 per year. It will be remembered that the land under irrigation is irrigated from the flood waters of the coulee leading on to the Fifer tract.

The witness, Hilger, for defendant, testified that alfalfa in the country where he was engaged in farming, some twenty-five or thirty miles removed from the Fifer land, was worth during the years in question from $6.00 to $10.00 per ton (Tr. 133). Yet, it should be noted that the witness was testifying to a condition wholly different from that existing at the Fifer place. He was farming in an irrigated district where the stockmen raised their own feed

and usually aimed to raise only sufficient for their own needs (Tr. 134), while the Fifer land is in a stock country twenty-five miles from the nearest railroad station and his is the only irrigated place on the river.

The court's attention is directed to the further fact that no stockman or farmer operating in the vicinity of the Fifer land was called to controvert the price of hay as given by the witnesses for plaintiff or to question their estimate of the amount of hay that would have been produced during those years. It is significant that while the testimony shows that defendant's witnesses, Landz and Sontag, were in the field in charge of a large number of teams and no doubt buying hay during the period of time in controversy, they did not question the prices given by plaintiff's witnesses.

Witness Hilger placed a comparatively low price upon the value of the Fifer land on his direct examination, a value of from ten to fifteen cents per acre for grazing purposes. However, on cross examination this witness admitted that if the land was capable of producing the crops testified to by the witnesses for the plaintiff and of the value testified to, that the land would be of considerable value. In fact the value then placed upon the property was only slightly under the value given it by witnesses for the plaintiff. To like effect was the testimony of the witness Walter O. Downing, for the defendant.

Plaintiff in error argues that as to this feature of

the case, as in the matter of the fences, that the plaintiff did not segregate his damages and show what part was due to the acts of the defendant and what part was due to the acts of third parties. We submit that the contention is groundless and what was said in disposing of the question relating to the fences applies with equal force here. There is not one iota of testimony that any damage of any kind or character was caused to the crops growing upon the land by third parties and no testimony that any of the fences were destroyed by them. As heretofore set forth, the testimony is conclusive that the destruction of the fences is chargeable to the defendant.

Surely defendant cannot escape liability for its wrongful acts in destroying the fences surrounding the Fifer tract simply because after such destruction other people may have entered upon and across said land. If others did use the roads across the land they did so because of the wrongful act of the defendant. To say that any damage resulted to the crops or to the fences by reason of such use is merely a matter of speculation and conjecture and there is no evidence to support such contention.

It is the law, as plaintiff in error contends and as announced by the Supreme Court of Montana, in Park vs. Grady, 62 Mont. 246, and other cases cited, that a verdict of the jury based upon speculation and conjecture, cannot stand, but the law does not require that degree of proof which amounts to demonstration, moral certainty, or that degree of

proof which produces conviction in an unprejudiced mind being sufficient to sustain the verdict of the jury.

Reilly vs. City of Butte, 64 Mont. 355.

Whether the fences were destroyed by plaintiff in error or strangers, and whether the resulting loss of crops was due to the acts of plaintiff in error or others was one of the disputed facts. There was an abundance of evidence on this point and especially so when considered in connection with the admissions contained in the answer that it "opened some of the fences of plaintiff enclosing said lands" and the jury having found the facts adversely to plaintiff in error this court will not set up its judgment against that of the jury.

We believe that the court may properly assume that if other parties were responsible in any degree for the destruction of the fences or the loss of crops the defendant would have presented some evidence of that fact to the jury—in other words, the court will presume that the defendant presented the best evidence available.

Where there is substantial evidence to support one party's contention which was fairly submitted to the jury an appellate court will not on appeal from the judgment interfere with the verdict rendered.

Ball vs. Gussenhaven, 29 Mont. 321;
White vs. Baling, 41 Mont. 138;
Cohen vs. Clark, 44 Mont. 151.

Where there is a substantial conflict in the evidence an appellate court will not reverse the judgment of the lower court on the ground of alleged insufficiency of evidence.

Tooms vs. Hornbuckle, 1 Mont. 286;
Budd vs. Perkins, 6 Mont. 223;
Cabbage vs. Schultz, 16 Mont. 14;
Nelson vs. Great Northern Railway Co., 28 Mont. 297;
Fearron vs. Mullens, 38 Mont. 45;
Matheson vs. Connerly, 46 Mont. 103.

Plaintiff in error in computing the damage to fences or rather the cost of reproduction says that there were ten forties, where as a matter of fact in addition to the ten surrounding the outside of the land there was a cross fence separating the east forty from the main body and a fence following the course of the river to a point where the cross fences connected with the south line fences, making a total of at least twelve forties. In addition to the damage defendant in error is entitled to recover for losses and destruction of fences, there is an item of replacing and time of plaintiff in the effort he made to keep up the fences (Tr. 39, 42).

Counsel argues that the court erred in its instructions to the jury relative to the measure of damage for injury to the land and insist that the court should have instructed that the measure of damage was the cost of restoring the land to its former condition and cite cases in support of that contention.

We believe that the court correctly instructed the jury in this regard.

There was no testimony offered by the defendant to show that the cost of restoring the land was less than the difference in the value before and after the injury complained of. In the second place plaintiff in error did not request an instruction incorporating therein its theory on the question of the measure of damage and consequently cannot now complain.

We believe the burden of proof was upon the defendant.

In the case of Zienbarth vs. Nye, 42 Minn. 541, 44 N. W. 1027, the trial court instructed the jury that the measure of damage for injury to the property was the difference between the value of the property before and after the injury. The defendant excepted to the instruction but offered no instruction on the point and on appeal insisted that the true rule was the cost of restoring the land and not the difference in the value.

In sustaining the instruction the Supreme Court said:

> "But, if counsel thought that witnesses were making their estimates on an erroneous basis, it was for him to ask the court to instruct them on the point, or develop their mistake on cross examination; or, if he thought that the cost of restoring the land to its former condition would be less than the injury to the value of the land from letting the ditches and embankments re-

main, it was for him to show it. The court could not assume this to be so, in the absence of proof."

See also

Karst vs. Railroad Company, 23 Minn. 401.

In the case of Hartshorn vs. Caddock, 31 N. E. (N. Y.) 997, at page 999, the court having under consideration this identical question, said:

> "When, as in this case damages are to be assessed upon one of two methods, according to the circumstances, and plaintiff's proof is by one of these methods only, and the defendant failed to supply the other mode of proof, which may be more favorable to him, or to raise any question as to the failure of the plaintiff to supply it at the trial, an appellate court ought not to reverse the judgment, especially in a case like this, where there is nothing to show, and no claim ever made, that the other theory of damages would be more favorable to the defendant."

And in the case of Mauda vs. City of Orange, 72 Atl. (N. J.) 42, at page 743, the Supreme Court of New Jersey said:

> "The defendant now urges that it was incumbered upon the plaintiff to introduce evidence as to the diminution of value, so that the jury might be allowed to decide which amount was the less. In this we think the defendant erred. The plaintiff substantially took the position that

> the least expensive way of compensating for the injury that had been done was to restore the property to its former condition. If the defendants disputed that, they had the right to introduce evidence and show that the diminution in value was less than this cost."

Citing with approval the case of Hartshorn vs. Caddock, 31 N. E. 997.

The defendant did not introduce testimony in support of their theory and neither did it request an instruction to the jury incorporating this method of determining damage.

Error cannot be predicated on the failure of the court to charge the jury as to an issue raised in the case when it does not appear that the court was requested to charge the jury as to such issue.

Carter vs. Carusi, 112 U. S. 478.

Courts are not inclined to grant a new trial merely on account of an ambiguity in the charge of the court when it appears that the complaining party made no effort at the trial to have the point explained.

Tweeds Case, 16 Wall, 504;
The Sebyl Case, 4 Wheat, 98;
Baltimore and P. R. Co. vs. Mackey, 157 U. S. 72.

When the instruction is correct so far as it goes, and the only contention is that it did not go far enough, such contention cannot be taken advantage

of on appeal, unless the attention of the trial court was called to the omission and request made for more explicit instructions.

> Chicago Ry. Co. vs. Healy, 86 Fed. 245 (C. C. A.).

Defendant cannot complain of an omission to instruct the jury as to the measure of damages when he failed to request an appropriate charge.

> Texas Ry. Co. vs. Cody, 67 Fed. 71 (C. C. A.).

The trial court cannot be put in error because an instruction fails to cover every feature of the case. It is the duty of one who says that an instruction is not broad enough to offer one which is.

> Nelson vs. Boston & N. Co., 35 Mont. 223;
> Heilman vs. Chicago, Milwaukee & St. Paul Ry. Co., 45 Mont. 406.

The testimony offered on behalf of plaintiff meets the requirements of the law in every respect as to the degree of proof required in actions to recover damages for loss of crops. The probable production from the land was shown by men familiar with the land, the general conditions and every fact which would make their testimony admissible and sufficient to establish the loss. The market price was shown, the cost of producing, irrigating and harvesting was shown by competent evidence, the question was fairly

presented to the jury under proper instructions and the jury's findings should not be disturbed.

Counsel argues that the court committed error in sustaining objection to question propounded to the witness Landz. (Assignment of Error III, g). We submit that the question was not proper on redirect examination and consequently no error was committed in excluding the evidence. Further, there was no proper offer of proof made and the assignment should not be considered. Counsel set forth at some length, in the brief of plaintiff in error, the purported facts with reference to hauling supplies and materials to the camps. We submit that if these were the facts they should have been incorporated in a proper offer of proof in order that this court might determine from the record the question presented.

Assignment of Error III, j. deals with the exclusion of certain testimony which defendant sought to prove by the witness Sontag. We insist that this witness had not shown himself qualified to answer the question and that it was not proper redirect examination and no error was committed by the trial court. Plaintiff was not suing for the use and occupation or for the rental value of the land for the purposes to which defendant had made use thereof, but for damages to fences, loss of crop and injury to his land.

We have answered each and all of the assignments of error covered in the brief of plaintiff in error and we believe that we have shown conclusively that

the case was fairly tried and no reversible error of any kind committed.

The argument of counsel, contained in the last paragraph of their brief, on page 59, does not appeal to us in the least. This appeal is of as much importance to land owners in Montana who have leased their lands to oil companies for oil development as it is to the oil operators. These land owners and the people of the state are anxious to know whether an oil company can come to Montana, enter into a written contract and then entirely disregard it and force them into the courts to protect their rights. If these companies will not "live up" to their contracts then it is far better that the development of oil and gas in Montana be delayed and retarded and the oil permitted to remain in the ground, at least until such time as operators are found who have some regard for their contracts and the rights of the people with whom they deal.

We respectfully submit that the judgment and order appealed from should be affirmed.

Respectfully submitted,

FORD & CHOATE,

Attorneys for Defendant in Error.